

**IOWA DEPARTMENT OF NATURAL RESOURCES  
ADMINISTRATIVE CONSENT ORDER**

IN THE MATTER OF:

**BRIAN HOFMEYER**  
Facility ID#- 56296  
Sioux County, IA

ADMINISTRATIVE CONSENT ORDER  
NO. 2008-AFO- ~~23~~

TO: Brian Hofmeyer  
4334 390<sup>th</sup> Street  
Hospers, IA 51238

**I. SUMMARY**

This administrative consent order is entered into between the Iowa Department of Natural Resources (DNR) and Brian Hofmeyer for the purpose of resolving violations relating to a prohibited manure discharge that caused a fish kill. In the interest of avoiding litigation, the parties have agreed to the provisions below.

Questions regarding this administrative consent order should be directed to:

**Relating to technical requirements:**

Brandon Miner, Field Office 3  
Iowa Department of Natural Resources  
1900 N. Grand, Gateway North, Suite E 17  
Spencer, IA 51301  
Phone: 712/262-2901

**Relating to legal requirements:**

Kelli Book, Attorney for the DNR  
Iowa Department of Natural Resources  
7900 Hickman Road, Suite 1  
Urbandale, Iowa 50322  
Phone: 515/281-8563

**Payment of penalty to:**

Director of the Iowa DNR  
Wallace State Office Building  
502 East Ninth Street  
Des Moines, Iowa 50319-0034

**II. JURISDICTION**

This administrative consent order is issued pursuant to the provisions of Iowa Code section 455B.175(1), which authorizes the Director to issue any order necessary to secure compliance with or prevent a violation of Iowa Code Chapter 455B, Division III, Part 1 or Iowa Code Chapter 459A and the rules adopted or permits issued pursuant thereto and Iowa Code section 455B.109 and 567 Iowa Administrative Code (IAC) Chapter 10, which authorize the Director to assess administrative penalties.

**RECEIVED**  
**JUN 25 2008**

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**III. STATEMENT OF FACTS**

1. Brian Hofmeyer owns and operates an open cattle feedlot operation located in section 33 of Lynn Township, Sioux County, Iowa. Mr. Hofmeyer raises approximately 2,500 head of open lot cattle on his farm. On November 22, 2006, DNR issued a construction permit that stated the design capacity of the open feedlot is 4,000 head of beef cattle.

2. On March 13, 2007, Mr. Hofmeyer was issued a National Pollutant Elimination System (NPDES) Permit #2840034. Section VII of the NPDES permit issued to Mr. Hofmeyer requires reporting a release within six hours of the onset of the release.

3. On the morning of August 6, 2007, Mr. Hofmeyer's open feedlot received over one inch of rainfall that caused runoff to enter an unnamed tributary of the Floyd River. Installation of runoff controls to comply with the NPDES permit had not yet been completed at the time of the rainfall. Moreover, the release was not reported as required by NPDES permit #2840034.

4. On August 6, 2007, DNR Field Office 3 was contacted by the public regarding dead fish in Floyd River. DNR Field Office 3 environmental specialists, Tom Roos, Sheila Kenny, and Brandon Miner, investigated the fish kill. They notified the DNR fisheries bureau located in Spirit Lake, IA, about the fish kill so that fisheries personnel could meet field office personnel on site.

5. Upon arrival at the site, Mr. Roos and Mr. Miner went directly to the Highway 395<sup>th</sup> street bridge located on the northwest edge of Hospers. Ms. Kenny joined the group later in the inspection. At the 395<sup>th</sup> street bridge, there were many dead fish observed at this location including chubs, minnows, bullheads, and catfish.

6. Throughout the day, the DNR environmental specialists performed field tests, collected laboratory samples, and took photographs at the following sites:

**Site #1:** Lily Avenue Bridge located on an unnamed tributary of the Floyd River which is located downstream from the Brian Hofmeyer open feedlot. No fish alive or dead were located at this location.

**Site #2:** 400<sup>th</sup> Street Bridge located on the Floyd River west of Hospers. Many dead fish were observed at this location.

**Site #3:** 430<sup>th</sup> Street Bridge located on the Floyd River. Many dead fish were observed at this location.

**Site #4:** 380<sup>th</sup> Street Bridge on the Floyd River north of Hospers. No dead fish were observed at this location.

**Site #5:** An unnamed tributary of the Floyd River at the bridge just north of Hospers on Old Highway 60. The water appeared clear and no fish, alive or dead, were observed at this location.

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**Site #6:** An unnamed tributary of the Floyd River at the bridge on 380<sup>th</sup> Street, approximately two miles west of Highway 60.

**Site #7:** An unnamed tributary at the bridge on Larch Avenue, approximately ¼ mile south of 380<sup>th</sup> Street. The tributary was not flowing at the time of the sampling.

**Site #8:** An unnamed tributary at the bridge on Larch Avenue, approximately ¼ mile south of Site #7. This creek was flowing at the time of sampling and the water appeared clear.

**Site #9:** The Brian Hofmeyer Feedlot located on 390<sup>th</sup> Street. Mr. Hofmeyer stated that some runoff controls/diversion berms and basin work had been accomplished in the past week, however, the work was not finished. Upon visual inspection, it was obvious that a cut channel was present from the feedlot area leading directly to the unnamed tributary of the Floyd River downstream of sites #6, #7, and #8. It was apparent that during a rainfall event this channel carried runoff from the feedlot to the tributary. However, runoff from the feedlot was not reaching the tributary on the date of inspection two days after the rainfall. Laboratory samples were taken from feedlot runoff water that was pooled in the cut channel.

7. The following table summarizes results of field tests taken during the August 6, 2007 investigation. Samples are listed in the order they were taken.

Location	Ammonia (mg/L)	Dissolved Oxygen (mg/L)	Temperature (Degrees C)	pH
Site #1	2.5	4.0	19	8.0
Site #2	1.2	5.0	22	8.2
Site #3	0.6	6.5	25	8.2
Site #4	0.8	7.5	22	8.2
Site #5	0.5	9.0	23	8.1
Site #6	0.2	6.5	18	8.3
Site #7	1.5	5.0	21	8.1
Site #8	0.4	6.5	20	8.1
Site #9	No Data	No Data	No Data	No Data

8. The following table summarizes the laboratory samples taken during the investigation. Fecal coliform, E. Coli testing, ammonia Nitrogen (NH<sub>3</sub>-N), and biochemical oxygen demand (BOD) testing was performed by the University Hygienic Laboratory in Ankeny.

Location	NH <sub>3</sub> -N (mg/L)	Fecal Coliform (Col/100mL)	E. Coli (Col/100 mL)	BOD (mg/L)
Site #1	1.1	22,000	21,000	7
Site #2	0.34	7,000	4,600	4
Site #3	0.46	2,200	2,100	5

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Site #4	0.23	920	640	< 2
Site #5	0.41	6,000	5,700	4
Site #6	0.06	330	280	< 2
Site #7	0.90	49,000	7,000	19
Site #8	0.10	510	420	< 2
Site #9	190	960,000	730,000	77

9. The test results and on-site observations indicate Mr. Hofmeyer's open feedlot received over one inch of rain causing runoff that flowed to the northeast, entering an unnamed tributary of the Floyd River. This runoff was highly contaminated with cattle manure as was determined by the extremely high fecal coliform numbers, E. Coli, ammonia, and BOD results from the runoff water. Jim Berquist, natural resource technician for the DNR Fisheries Bureau, concluded that a total of 97,108 fish were killed and the expenses for the fish kill were valued at \$12,448.70. On January 24, 2008, DNR personnel met with Mr. Hofmeyer. During this meeting, it was determined there may have been other contributors to the fish kill, and that Mr. Hofmeyer would not be held liable for the entire fish restitution.

10. On September 25, 2007, a Notice of Violation letter and Report of Investigation was sent to Mr. Hofmeyer for the violations associated with the fish kill. The letter also informed Mr. Hofmeyer that these violations were being referred for further enforcement.

#### IV. CONCLUSIONS OF LAW

1. Iowa Code section 455B.186(1) states that a pollutant shall not be disposed of by dumping, depositing, or discharging such pollutant into any water of the state, except this section shall not be construed to prohibit the discharge of adequately treated sewage, industrial waste, or other waste pursuant to a permit issued by the Director. Mr. Hofmeyer allowed cattle manure from his open lot to enter into an unnamed tributary of the Floyd River. Laboratory sample results and visual observations confirmed the discharged cattle manure was not adequately treated or solids settled. Mr. Hofmeyer did not have a permit for the discharge of manure. The above-mentioned facts indicate a violation of this provision.

2. 567 IAC 65.2(1) states that the minimum level of manure control for any open feedlot shall be the removal of settleable solids prior to discharge into a water of the state. Allowing unsettled manure to run into the creek is a violation of this provision. The above-mentioned facts indicate a violation of this provision.

3. 567 IAC 61.3(2)"b" states that water of the state shall be free from floating debris, oil, grease, scum and other floating materials attributable to wastewater discharges or agricultural practices in amounts sufficient to create a nuisance. The runoff from the Hofmeyer feedlot was highly contaminated with cattle manure as was determined by the extremely high fecal coliform numbers, E. Coli, ammonia, and BOD results from the runoff water. The above-mentioned facts indicate a violation of this provision.

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4. 567 IAC 61.3(2)"c" states that water of the state shall be free from materials attributable to wastewater discharges or agricultural practices producing objectionable colors, odor, or other aesthetically objectionable conditions. Field and lab analysis results of water samples collected during the investigation indicated the presence of animal wastes. The above-facts indicate a violation of this provision

5. 567 IAC 61.3(2)"d" states that such water shall be free from substances attributable to wastewater discharges or agricultural practices in concentrations or combination which are acutely toxic to human, animal, or plant life. The manure discharge from Mr. Hofmeyer's open feedlot was severe enough to kill 97,108 fish in the Floyd River downstream to 430<sup>th</sup> Street. The above-facts indicate a violation of this provision.

6. 567 IAC 65.101(9) "a" states a person handling, storing, transporting, or land applying manure, process wastewater, open feedlot effluent, settled open feedlot effluent or settleable solids from an open feedlot operation who becomes aware of a release shall notify DNR of the occurrence of the release as soon as possible but not later than six hours after the onset or discovery of the release. Section VII of NPDES permit #2840034 requires that a release shall be reported in accordance with 567 IAC 65.100 and 65.101(9). DNR was not notified of the manure release. The above-mentioned facts indicate a violation of the NPDES permit and the aforementioned provision.

7. Iowa Code section 481A.151 provides that a person who is liable for polluting a water of this state in violation of state law shall also be liable to pay restitution to the DNR for injury caused to a wild animal by the pollution. The DNR has adopted 571 IAC chapter 113. 571 IAC 113 provides that a person who is liable for polluting a water of this state in violation of state law shall also be liable to pay restitution to the DNR for injury caused to a wild animal by the pollution. A fish kill resulted from the manure discharge at Mr. Hofmeyer's open feedlot.

**V. ORDER**

THHEREFORE, the DNR orders and Mr. Hofmeyer agrees to do the following:

1. Mr. Hofmeyer shall operate and maintain animal feeding operation structures in compliance with all applicable departmental rules and regulations.
2. Mr. Hofmeyer shall pay an administrative penalty of \$6,750.00 and restitution in the amount of \$9,336.00 for a total of \$16,086 in accordance with the following payment plan. The administrative penalty shall be paid first and the remaining payments shall be applied to the restitution:

\$676.00 due June 15, 2008;	\$670.00 due June 15, 2009;
\$670.00 due July 15, 2008;	\$670.00 due July 15, 2009;
\$670.00 due August 15, 2008;	\$670.00 due August 15, 2009;

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\$670.00 due September 15, 2008;	\$670.00 due September 15, 2009;
\$670.00 due October 15, 2008;	\$670.00 due October 15, 2009;
\$670.00 due November 15, 2008;	\$670.00 due November 15, 2009;
\$670.00 due December 15, 2008;	\$670.00 due December 15, 2009;
\$670.00 due January 15, 2009;	\$670.00 due January 15, 2010;
\$670.00 due February 15, 2009;	\$670.00 due February 15, 2010;
\$670.00 due March 15, 2009;	\$670.00 due March 15, 2010;
\$670.00 due April 15, 2009;	\$670.00 due April 15, 2010; and
\$670.00 due May 15, 2009;	\$670.00 due May 15, 2010

If any of the said payments are not received by the due date, the remaining penalty shall be due immediately.

**VI. PENALTY**

1. Iowa Code sections 455B.191 and 459A.502, authorize the assessment of civil penalties of up to \$5,000.00 per day of violation for each of the water quality violations involved in this matter.

2. Iowa Code section 455B.109 authorizes the Environmental Protection Commission to establish by rule a schedule of civil penalties up to \$10,000.00, which may be assessed administratively. The Commission has adopted this schedule with procedures and criteria for assessment of penalties in 567 IAC chapter 10. Pursuant to these rules, the DNR has determined that the most effective and efficient means of addressing the above-cited violations is the issuance of an administrative consent order with an administrative penalty of \$6,750.00. The administrative penalty is determined as follows:

Economic Benefit – The construction of runoff controls was not complete at the time of the fish kill on August 6, 2007. However, the construction of runoff controls has continued since the date of the fish kill and Mr. Hofmeyer has reported that the work is nearly completed except for final grading. Mr. Hofmeyer was issued a construction permit for the settled open feedlot effluent basin on November 22, 2006. The economic benefit that Mr. Hofmeyer received in delaying the expenses of installing the controls is minimal; therefore no economic benefit is being assessed.

Gravity – One of the factors to be considered in determining the gravity of a violation is the amount of penalty authorized by the Iowa Code for that type of violation. As indicated above, substantial civil penalties are authorized by statute. Despite the high penalties authorized, the DNR has decided to handle the violations administratively at this time, as the most equitable and efficient means of resolving the matter. Multiple rule or statutory provisions were violated including discharge to water of the state, failure to report a discharge, and violation of water quality standards. The violations threaten the integrity of the water quality program. Actual harm to the environment was documented by visual and olfactory observation of impact to the Floyd River, including dead fish. 97,108 fish in Floyd

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River were killed by the runoff release from the Hofmeyer feedlot. A significant number of hours were also used in the investigation and technical outreach portion of this investigation by both the DNR Field Office staff and the DNR Fisheries staff. Therefore, \$2,000.00 is assessed for the discharge to a water of the state violations referenced in Section IV, Paragraphs 1 and 2 above; \$2,000.00 for the general water quality violations referenced in Section IV, Paragraphs 3, 4, and 5 above; and \$500.00 for the failure to report a discharge referenced in Section IV, Paragraph 6 above for a total of \$4,500.00 for this factor.

Culpability – Mr. Hofmeyer was culpable in that he failed to build and maintain runoff control structures so that runoff did not cause a water quality violation. Owners must be aware of possible consequences when rainfall events occur and manure runoff can reach a nearby creek. It is noted that after discussing the situation with Mr. Hofmeyer on August 6, 2007, that silt fencing was used to keep open feedlot runoff water from reaching the creek until construction of the runoff controls could be completed. \$2,250.00 is assessed for culpability.

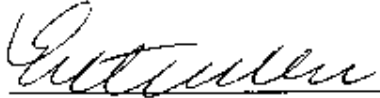
**VII. WAIVER OF APPEAL RIGHTS**

This administrative consent order is entered into knowingly and with the consent of Mr. Hofmeyer. For that reason Mr. Hofmeyer waives his rights to appeal this administrative consent order or any part thereof.

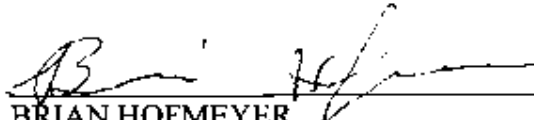
**VIII. NONCOMPLIANCE**

Failure to comply with this administrative consent order, including failure to timely pay any penalty, may result in the imposition of further administrative penalties or referral to the attorney general to obtain injunctive relief and civil penalties pursuant to Iowa Code section 455B.191. Compliance with Section "V. Order" of this administrative consent order constitutes full satisfaction of all requirements pertaining to the specific violations described in Section "IV. Conclusions of Law" of this administrative consent order. DNR reserves the right to bring enforcement action, including penalties, or to request that the attorney general initiate legal action to address other violations not described in Section "IV. Conclusions of Law" of this administrative consent order but which may arise from the facts summarized in Section "III. Statement of Facts" of this administrative consent order. DNR specifically reserves the right to pursue enforcement action, including penalties, for any current violations not specifically cited in this administrative consent order.

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RICHARD A. LEOPOLD, DIRECTOR  
Iowa Department of Natural Resources

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Dated this ~~30~~ day of  
~~June~~, 2008.  
*June*

  
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BRIAN HOFMEYER

Dated this 23<sup>rd</sup> day of  
June, 2008.

ID #56296; Kelli Book; DNR Field Office 3; Ken Hessenius; Gene Tinker; EPA; VIII.D.1.a and VIII.D.3.a